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Robert B. Hansen; Craig Barlow; Noell Wootton; Gary H. Weight; Attorneys for Respondent;
D. Sanford Jorgensen; Attorney for Appellant;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent, :

vs. :

Case No. 15573

STEVEN J. LAURSEN, :

Defendant and Appellant :

APPELLANT'S BRIEF

Appeal from the judgment of
the Fourth Judicial District for Utah County
Honorable J. Robert Bullock

Robert B. Hansen
Utah Attorney General
State Capital Building
Salt Lake City, Utah 84114

Craig Barlow
Deputy Utah Attorney General
State Capital Building
Salt Lake City, Utah 84114

Noall Wooton
Utah County Attorney
County Building
Provo, Utah 84601

Gary H. Weight
Deputy County Attorney
County Building
Provo, Utah 84601

D. SANFORD JORGENSEN
MOONEY, JORGENSEN & NAKAMURA
352 South 300 East, Suite #3
Salt Lake City, Utah 84111
Attorney for
Appellant

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Deputy County Attorney
County Building
Provo, Utah 84601

D. SANFORD JORGENSEN
MOONEY, JORGENSEN & NAKAMURA
352 South 300 East, Suite #3
Salt Lake City, Utah 84111
Attorney for
Appellant

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STATEMENT OF KIND OF CASE

This is an appeal from a conviction of and sentencing for two counts of automobile homicide.

DISPOSITION IN LOWER COURT

A jury found the Defendant guilty of each of two counts of automobile homicide and the Court sentenced the Defendant-Appellant to two indeterminate sentences of 0-5 years at the Utah State Prison, the sentence to run concurrently.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal and a new trial and, if that relief is not granted to order the District Court to resentence the Defendant on only one count.

FACTS

On the 27th day of July, 1977 the Defendant was the driver of a truck which collided with a motorcycle upon which Ronald Beck and Michael K. Hansen were riding, (T-6,T-25). The latter two were killed. There was a passenger with the Defendant who testified at trial, Robert Michael Greenwood (T-1 to T-14). The truck rolled over after the collision which caused injuries to the Defendant and Greenwood. (T-8,-10,T-35). And there was evidence that the Defendant was in shock for several hours thereafter. (T-10, T-16, T-35, T-61).

After the Defendant and Greenwood got out of the truck they left the scene with a witness, David N. Jones (T-9,-10, T-17) and the Defendant was dropped off at his home. (T-10, T-13, T-18). The only evidence presented at

trial regarding the intoxication of the Defendant was that he was not intoxicated prior to being taken home. (T-11, T-20).

The accident took place about 9:15 P.m. (T-45, T-38). At about 11:30 p.m.. The Defendant met Bob Greenhalgh, a witness, from the Utah Highway Patrol at the American Fork Hospital (T-34) and permitted his blood to be withdrawn for analysis (T-35). The Defendant was then arrested by the witness Greenhalgh for automobile homicide under the Utah Statute 76-5-207 U.C.A. (1953 as amended). (T-58)

On the following day officer Greenhalgh had the Defendant sign a waiver of rights and discussed the previous day's events with him. The officer then reduced the statement to writing and the writing was introduced at trial (T-36, T-49 and Exhibit No. 13).

In that statement the Defendant admitted he was the driver, stated he had drank beer during the day, that his last beer was about 7:00 p.m. and that he could remember nothing after the collision. The witness Greenwood stated that he and the Defendant and several other people drank about two gallons of beer over the course of the day (T-4,5, T-11) and the Defendant had his last beer at about 8:00 p.m. (T-4,5). And that the Defendant did not seem intoxicated (T-11).

Over the objections of the Defendant the Court permitted evidence by Dr. Albert D. Swensen, PH.D, about the blood alcohol results and the relating of those results back to the time of driving (T-17). For Doctor Swensen to relate back, the State proposed hypotheticals using 8:30 and 7:00 as the time for the last drink (T-77, T-78). The Defendant objected (T-77) and was overruled. Dr. Swensen stated that if the last drink was at 10:00 p.m. he could not calculate the blood alcohol level at the time of driving (T-79).

The Defendant objected to any evidence of his state of intoxication at
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the hospital including the introduction of the chemical test. His objection was based on the fact there was insufficient factual foundation to relate the alcohol in his blood at the time of driving with his level of alcohol at 11:30 since, no one had testified regarding consumption during the intervening period. (T-54 thru 57, T-71). The Court utilized a presumption to overrule the objection that placed the Defendant in a position of producing evidence to over come it. (T-36).

ARGUMENT

I.

IN AN AUTOMOBILE HOMICIDE PROSECUTION, IN ORDER TO UTILIZE THE PRESUMPTIONS PROVIDED BY STATUTES 41-6-44 (b) and 41-6-44.5 U.C.A. (as amended 1953), THERE MUST BE FACTS OR INFERENCES BASED ON FACTS TO SHOW THAT THE BLOOD ALCOHOL-LEVEL AT THE TIME OF CHEMICAL TESTS IS BASED ON THE SAME CONSUMPTION OF ALCOHOL THAT EXISTED AT THE TIME OF DRIVING.

In an automobile homicide case under Section 76-5-207 U.C.A., (1953 as amended) a person is guilty if he operates a vehicle in a negligent manner at the time he is "under the influence of intoxicating liquor.... to a degree that renders the action incapable of safely driving a vehicle." Subparagraph (2) of that section permits the District Court to utilize the presumptions listed in 41-6-44 (b) U.C.A. (1953 as amended) to determine whether a driver is presumed to be intoxicated.

Section 41-6-44 (b) states that certain well known presumptions exist regarding the level of intoxication of a person, based on a measured level of alcohol present in that person's blood at the time of extraction.

Section 41-6-44.5 U.C.A. (1953 as amended) goes on to presume that if a blood test is taken within one hour of the alleged incident then the results are presumed to be the same as at the time of driving. It if is more than

an hour, then the results of a chemical test must be established by an expert

witness showing its probative value. In either situation the state would be required to show that the Defendant did nothing to alter the results of his blood-alcohol level between times. In other words, the statute is clearly designed to meet the evidentiary problems of evidence caused by the changing levels of blood alcohol over time in the human body where there is a necessary delay between the act and the tests, not to substitute speculation for foundation.

For any evidence, and especially scientific evidence, to be admitted to evidence there are preliminary questions that must be answered to determine if they lend credence to the ultimate probative value of the evidence sought to be admitted. These are foundational to the evidence. McCormick on Evidence § 53 (2nd Ed., 1972). The problem presented here is that no such foundation was laid that the Defendant has consumed all of the alcohol reflected in his blood test before he had the collision. He clearly could have consumed some during the almost two hours between the collision and the test with no one, including the Defendant, being aware of it. It is improper to assume a state of facts, without any factual evidence to support the assumption, and, in the light of a presumption of innocence, the burden is on the state to provide it.

In effect, what the District Court ruled was that absent evidence to the contrary, a presumption arises that a person has nothing alcoholic to drink after an accident and before the blood test. In this instance, while saying the burden of proof does not shift, he indicated that for the Defendant to prevail on the issue of intoxication, he must produce evidence negating the presumption. (T-56). This has the effect of making a judicially imposed presumption that cannot be supported by any surrounding facts. In further takes the form of a rebuttable presumption rather than simply an inference. This ruling, the Court places the Defendant in a position of having the burden of proof shifted to him, depriving the Defendant of the presumption of innocence

of proof shifted to him, depriving the Defendant of the presumption of innocence that is to prevail through the entire trial. State v Potello 40 Utah 56, 119 Pac. 1023 (1911) and 76-1-501 U.C.A. (1953 as amended) and denies his rights under the Fifth Amendment of the United States Constitution and under Article I, Section 12 of the Consitution of the State of Utah which protects him from the compulsion of testifying against himself or giving evidence against himself.

The defect in the presumption in this case is there are no evidentiary facts upon which to base it. To some extent, the law in Utah is, evidentiary matters, "...one presumption or inference cannot rest upon another mere inference on presumption. It can only rest on proven facts." State v Potello, 119 Pac. at p. 1028. That rule is not absolute, however, and was at least modified in State v Hall 105 U. 162, 145 P. 2d 494 (1942). The Court there quoted from a New York case [citation omitted] in stating the standard to be applied if an inference is based on an inference.

The rule is not that an inference may never be based on an inference but,

"...rather than [sic] the prior inferences must be established to the exclusion of any other reasonable theory rather than merely be a probability, in order that the last inference of the probability of the ultimate fact may be based thereon." 145 P. 2d at p. 497.

Under either standard the presumption indulged by the District Court was impermissible and constitutes prejudicial error. There is no logical reason to expect that a person in the circumstances of the Defendant would not drink any alcohol after a collision. Nor are there any "proven facts" upon which to base an inference.

This Court further defined an inference , which, giving any benefit of doubt to the State, the District Court utilized, in a civil case, Wyatt v

Baughman 121 U. 98, 239 P. 2d 193 (1951). The Court stated 239 P. 2d 198:

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An "inference" or what is, as we have seen, frequently called a "presumption of fact" is a logical and reasonable conclusion of the existence of a fact in the case, not presented by direct evidence as to the existence of the fact itself, but inferred from the establishment of other facts from which, by the process of logic and reason, based upon common experience, the existence of the assumed may be concluded by the trier of the fact.

There were no facts presented at trial from which "through the process of logic and reason, based on common experience, the existence of the assumed fact may be concluded by the trier of fact." Without some sort of testimony about the tendencies of mankind to drink after a tragic accident can we assume that tendency is to drink? The only evidence regarding intoxication at the time of driving is that the Defendant was not intoxicated. (T-11, T-20)

When the presumptions and inferences allowed under the relevant statutes 41-6-44 and 41-6-44.5 U.C.A. are admitted to evidence based on an inference or presumption not grounded on a proven fact or common experience, the reliability of the conclusion is seriously in question. In fact the witness who testified pursuant to those statutory requirements stated that a last drink, after the collision, made it impossible to determine the alcohol level at the time of driving. (T-79) The Court erred in admitting evidence, not based on fact and allowing the statutory presumptions to be based on that lack of evidence. (See: Inferences based on inferences 5-ALR 3d 100, Sec. 13)

In anticipation of the response hereto, this case is distinguishable from cases involving the relating back of evidence of intoxication to the time of driving, (e.g. State v Sutliff 97 Eda. 523, 547 P. 2d 1128 (1976), State v Cannon 404 P. 2d 971. 17 U. 2d 105 (1965) and State v Bradley (unreported) Utah Supreme Court No. 15307, filed April 17, 1978. In none of these cases has the question regarding consumption of alcohol after the driving been involved. In each, but for the physical action of the body, the alcohol content was uncontested as to

the source of alcohol in the bloodstream.

Although in this case the state would have had a difficult, if not impossible, task to obtain a conviction, that is not a reason to assume facts based on no evidence. If that were the case, then facts necessary to prove a case beyond a reasonable doubt could always be provided by the device of inventing a presumption.

The creating of the presumption in this case may not be supported by public policy. The sparsity of cases wherein an issue of this nature presents itself would suggest more information is needed than is presented here. The Court's decision on this issue does not take into account the motivation for a Defendant leaving the scene of an accident, his mental state motivating the leaving of the scene or any distinguishable factors. A rule of law should have a broader application than just one case.

II.

IT WAS IMPROPER FOR THE COURT TO IMPOSE TWO SENTENCES FOR AUTOMOBILE HOMICIDE WHERE THERE WAS ONLY ONE ACT BY THE DEFENDANT AND THERE WAS NO SHOWING OF INTENT TO HARM ANY PERSON.

The Defendant was charged with two counts of automobile homicide, but was sentenced to two terms of 0-5 years at the Utah State Prison, the terms to run concurrently. The evidence presented at trial necessarily was synonymous for both counts. There is nothing in the facts to indicate any severance or divisibility of the acts alleged in those counts.

Section 76-1-402(1) U.C.A. (1953 as amended) forbids sentence, as imposed here, for separate offenses arising out of the same incident. That section says:

A Defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a Defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions

of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any such provision.

Pursuant to that section the Defendant should only receive one sentence.

In an criminal case that is based on negligence rather than on intentional acts there is no logic in double sentences. In a multiple victim crime such as robbery, murder or assault logic states that there is a conscious choice to commit the act against each of the victims. But where, as is our case, the Defendant committed only one negligent act and only was convicted of one act of being intoxicated, it is unfair and illogical to sentence him for more acts.

In Dawson v State 266 So. 2d 116 (Fla. 1972) the Supreme Court of Florida set aside one sentence of manslaughter where two victims riding in the same automobile were killed and the Defendant was convicted and sentenced on two counts. A similar result took place in Wyoming where a Defendant shot into a car containing 5 victims. He was convicted of 5 counts but only sentenced for one aggravated assault. Vigil v State Wyo. 563 P. 2d 1117 (1977) see also: State v Little 19 U. 2d53, 426 P. 2d4 (1967) (Convicted of robbery and larceny, only sentence for robbery permitted); People v McFarland 26 Cal. Rptr. 473, 373 P. 2d 449 (Calif., 1962) (Burglary and larceny only one sentence); People v Duran Colo., 515 P. 2d 1117 (1973).

In the case of Ladner v U.S. 358 U.S. 169, 3L.Ed 2d 199, 79 S.Ct. 209 (1958) the United States Supreme Court ruled that where a person fired a single blast from a shot gun, wounding two Federal officers, is but one assault. The Court's rationale being that if two victims constitute two separate assaults then the same would hold for fine. The Court felt that because of the nature of an assault, it would be unfair, resulting in potential sentences totally disproportionate to the act of assault. The same is more true where an act

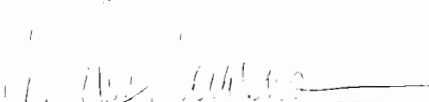
of negligence is all that is necessary.

The Court should remand the case to the District Court for the vacation of one sentence.

CONCLUSION

This case should be reversed and remanded to the Fourth District Court for retrial. Prejudicial and reversible error was committed when the Court admitted the result of blood-alcohol analysis into evidence by utilizing a statutory presumption of intoxication to rest on a presumption or inference that was not based on any facts in evidence. It must be shown, in order to utilize statutory presumptions of intoxication in an automobile homicide case, that the Defendant consumed no additional alcohol between the time of driving and the time of the blood upon which the presumption was based was extracted.

In the event the above relief is denied, one of the two sentences imposed should be vacated it being double punishment for the same criminal act.


D. SANFORD JORGENSEN
Attorney for the Appellant

CERTIFICATION OF MAILING

I do hereby certify that a copy of the foregoing document has been mailed, via United States Mail, postage prepaid to the following individuals: Robert B. Hansen, Utah Attorney General, State Capital Building, Salt Lake City, Utah 84114, Craig Barlow, Deputy Attorney General, State Capital Building, Salt Lake City, Utah 84114, Noall Wooton, Utah County Attorney, County Building, Provo, Utah 84601, and Gary H. Weight, Deputy County Attorney, County Building, Provo, Utah 84601 on this ____ day of May, 1978.